RECORD
AND
BRIEF

No. 15-214

# In the Supreme Court of the United States

JOSEPH P. MURR, *et al.*,
*Petitioners*,

v.

STATE OF WISCONSIN and ST. CROIX COUNTY,
*Respondents*.

**On Writ of Certiorari to the Court of Appeals of the State of Wisconsin**

## BRIEF OF *AMICI CURIAE* WALTER F. MONDALE, ST. CROIX RIVER ASSOCIATION, AND AMERICAN RIVERS IN SUPPORT OF RESPONDENTS

HOPE M. BABCOCK
*Counsel of Record*
DANIEL H. LUTZ
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, NW
Washington, D.C. 20001
(202) 662-9535
babcock@law.georgetown.edu

*Counsel for amici curiae*

June 17, 2016

## TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii

INTERESTS AND IDENTITY OF *AMICI* ..... 1

SUMMARY OF ARGUMENT ..... 4

ARGUMENT ..... 5

I. **The St. Croix River is Worthy of National Recognition and Protection Because of its Outstandingly Remarkable Scenic, Recreational, and Geologic Values and its Fish and Wildlife.** ..... 5

II. **Local Concern Led to Federal Protection for the St. Croix River.** ..... 16

III. **State and Local Ordinances Achieve the Wild and Scenic Rivers Act's Protection of the Lower St. Croix River.** ..... 18

CONCLUSION ..... 22

## TABLE OF AUTHORITIES

### UNITED STATES CONSTITUTION

U.S. Const. amend. V ..... 4

### STATUTES, REGULATIONS, AND ORDINANCES

Wild and Scenic Rivers Act of 1968,
16 U.S.C. §§ 1271-1287 ..... 3, 7, 20

Lower Saint Croix River Act of 1972,
Pub. L. No. 92-560, 86 Stat. 1174 ..... 17, 19

Minn. Stat. § 103F.351 (2016) ..... 19, 21

Wis. Stat. § 30.26 (2016) ..... 16

Wis. Stat. § 30.27 (2016) ..... 7, 19, 21

Minn. R. 6105.0351 (2016) ..... 7

2015-2016 Wisc. Legis. Serv. Act 55 ..... 21
(2015 S.B. 21) 336-38 (West)

St. Croix County, WI, Code of Ordinances
§ 17.36(I)(4)(a) (2005) ..... 21

### CASES

*Village of Euclid, Ohio v. Ambler Realty Co.*,
272 U.S. 365 (1926) ..... 15

*Just v. Marinette Cty.*, 201 N.W.2d 761,
56 Wis. 2d 7 (1972) ..... 15

**LEGISLATIVE HISTORY**

S. 897, 89th Cong. (1965) ..... 16

Designating a Segment of the St. Croix as Part of the Wild and Scenic Rivers System: Hearing on S. 1928 Before the Subcommittee on Public Lands of the Committee on Interior and Insular Affairs, 92d Cong. (1971-72) ..... 10

118 Cong. Rec. 34,391 (1972) ..... 8, 12

**SCHOLARLY AUTHORITIES**

Mark E. Cavaleri, John H. Mossler, and Gerald F. Webers, *The Geology of the St. Croix Valley in* Field Trip Guidebook for the Upper Mississippi Valley Minnesota. Iowa, and Wisconsin 23 (N.H Balaban, ed. 1987) ..... 13

James Taylor Dunn, Saving the River: The Story of the St. Croix River Association, 1911-1986 (1986) .....2, 4, 16

Theodore J. Karamanski, Saving the St. Croix: An Administrative History of the Saint Croix National Scenic Riverway (1993) ..... 4, 16, 17

Jan G. Laitos & Rachel B. Gamble, The Problem with Wilderness, 32 Harv. Envtl. L. Rev. 503 (2008) ..... 11

SCHOLARLY AUTHORITIES (CONTINUED)

William J. Lockhart, External Threats to Our National Parks: An Argument for Substantive Protection, 16 Stan. Envtl. L.J. 3 (1997) ..... 11

Eileen M. McMahon & Theodore J. Karamanski, North Woods River: The St. Croix River in Upper Midwest History ..... 17

Tim Palmer, Endangered Rivers and the Conservation Movement (1986) ..... 3, 16

Joseph L. Sax, Buying Scenery: Land Acquisitions for the National Park Service. 1980 Duke L.J. 709 (1980) ..... 11

WEBSITES

2016 Paddle Namekagon, Wild and Scenic Paddles, https://scrapaddle.org (last visited Apr. 12, 2016) ..... 3

About Us, American Rivers, www.americanrivers.org/about/ (last visited Apr. 4, 2016) ..... 2

Important Bird Areas, National Audubon Society, http://netapp.audubon.org/iba/IBA (last visited Apr. 12, 2016) ..... 14, 15

Most Endangered Rivers: About This Report. American Rivers, www.americanrivers.org/endangered-rivers/about/ (last visited Apr. 7, 2016) ..... 3

WEBSITES (CONTINUED)

Mussels of the St. Croix River, Prof. Dan Hornbach's Lab, www.macalester.edu/~hornbach/stcroix/musseldata.html (last visited Apr. 4, 2016) ..... 14

Mussels of the St. Croix River, U.S. Fish and Wildlife Serv.: Endangered Species, www.fws.gov/midwest/endangered/clams/stcroix.html (last visited Apr. 4, 2016) ..... 13

SCRA Advisory Council, St. Croix River Association, www.stcroixriverassociation.org/who-we-are/scra-advisory-council/ (last visited Apr. 5, 2016) ..... 2

St. Croix River Association, www.stcroixriverassociation.org (last visited Apr. 4, 2016) ..... 2

St. Croix River Association Photo Contest, St. Croix River Association, www.stcroixriverassociation.org/scra-photo-contest/ (last visited Apr. 12, 2011) ..... 3

St. Croix River Fishing Guides, St. Croix River Fishing, www.stcroixriverfishing.com/FishingGuides.html (last visited May 2, 2016) ..... 10

St. Croix State Park: Park Info, Minnesota Dep't of Natural Res., www.dnr.state.mn.us/state_parks/st_croix/narrative.html (last visited May 22, 2016) ..... 13

OTHER AUTHORITIES

Jane E. Brody, New Research Station Exploring the Ecology of a Pristine River, N.Y. Times, (Aug. 21, 1990) ..... 13

Bureau of Outdoor Recreation, Dep't of the Interior, Scenic River Study of the Lower St. Croix River (Feb. 1973) ..... 1

Elizabeth Fries Ellet, Summer Rambles in the West (1853) .....6, 7, 12

Bob Goligoski, Lower St. Croix Plan Applauded, St. Paul Pioneer Press, June 9, 1971, at 27, *quoted in* Jay Krienitz & Susan Damon, "The Rivers Belong to the People": The History and Future of the Wild and Scenic River Protection in Minnesota. 36 Wm. Mitchell L. Rev. 1179, 1190 (2010) ..... 17

Interagency Wild and Scenic Rivers Coordinating Council, U.S. Forest Serv. & Nat'l Park Serv., The Wild & Scenic River Study Process (Dec. 1999) ..... 8, 9

Letter from James Johnson, Mayor, Marine-on-St. Croix, Minnesota, to National Park Service, October 16, 1974, *quoted in* Theodore J. Karamanski, Saving the St. Croix: An Administrative History of the Saint Croix National Scenic Riverway 90 (1993) ..... 18

OTHER AUTHORITIES (CONTINUED)

Lower Saint Croix Nat'l Scenic Riverway,
41 Fed. Reg. 26,236 (June 25, 1976)..... 18, 19

Minnesota Dep't of Natural Res.,
Geology of Interstate Park:
The St. Croix Dalles (2009),
http://files.dnr.state.mn.us/destinations/state
_parks/interstate/interstate_geology.pdf..... 12

Nat'l Park Serv., Natural Res. Report
NPS/NRSS/EQD/NRR—2015/947,
2014 National Park Visitor Spending Effects:
Economic Contributions to Local
Communities, States, and the Nation (2014),
www.nature.nps.gov/socialscience/docs/
VSE2014_Final.pdf ..... 9

Wis. Dep't of Natural Res.,
Minn. Dep't of Natural Res.,
U.S. Dep't of Interior, Nat'l Park Serv.,
Cooperative Management Plan of
the Lower St. Croix
National Scenic Waterway (2002)..... 5, 15, 20, 21

## INTERESTS AND IDENTITY OF THE AMICI[1]

*Amici* are one individual and two private not-for-profit organizations who embrace and represent the conservation and recreational interests of the St. Croix River ("the river") community. The federal government summarized such interests well when it declared that "the lower St. Croix River and its immediate environment possess outstandingly remarkable scenic and aesthetic, recreational, and geologic values, and that the river and its immediate environment should be protected for the benefit and enjoyment of present and future generations." Bureau of Outdoor Recreation, Dep't of the Interior, Scenic River Study of the Lower St. Croix River 11 (Feb. 1973) [hereinafter Scenic River Study].[2]

*Amicus* Walter Mondale is a former Vice President of the United States, U.S. Senator from the State of Minnesota, U.S. Ambassador to Japan, and Minnesota Attorney General. After serving as Minnesota Attorney General, he was appointed to fill a Senate vacancy in 1964, and then won reelection in 1966 and 1972. In 1976, Mondale was elected as Vice President of the United States, and served for four years. Mondale was also the Democratic Party's

---

[1] The parties in this case have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* made a monetary contribution to the preparation or submission of this brief.

[2] The bifurcation of the St. Croix River into "Upper" and "Lower" in government legislation and publications is an artifact of the designation process. In 1968, the entire St. Croix River except for the lowest fifty-two miles was incorporated into the Wild and Scenic Rivers system. Over the next ten years, that lower section was incorporated as well. *See* Part II, *infra*.

Presidential nominee in 1984. As a U.S. Senator, Mondale was the lead co-sponsor of the 1968 Wild and Scenic Rivers Act ("the Act"), and played an instrumental role in the designation of all sections of the St. Croix River for protection under the Act.

In the Twin Cities and several smaller riverine communities, people live, work, and play on the St. Croix River. *Amicus* St. Croix River Association ("the Association") represents these citizens of Minnesota and Wisconsin. Since the Association's founding in 1911, its underlying principle has remained constant: to "represent the direct interest of people living along the banks" of the river and to "sav[e] the St. Croix for the people." James Taylor Dunn, Saving the River: The Story of the St. Croix River Association, 1911-1986 1 (1986). The Association's more than 800 members are guided by a Board of Directors, as well as an Advisory Council whose members come from local government, local business, and environmental groups. *See, e.g.*, SCRA Advisory Council, St. Croix River Association, www.stcroixriverassociation.org/who-we-are/scra-advisory-council/ (last visited Apr. 5, 2016). Together, they advance the Association's mission: to "protect, restore, and celebrate the St. Croix River." St. Croix River Association, www.stcroixriverassociation.org (last visited Apr. 4, 2016).

*Amicus* American Rivers, Inc. is a national conservation organization founded in 1973. With over 200,000 members and supporters, American Rivers' mission is to "protect wild rivers, restore damaged rivers, and conserve clean water for people and nature." About Us, American Rivers, www.americanrivers.org/about/ (last visited Apr. 4, 2016). American Rivers has a particular interest in

the effective implementation of the Wild and Scenic Rivers Act. The organization was founded in part to promote the Act and ensure that the Act was being vigorously implemented. *See* Tim Palmer, Endangered Rivers and the Conservation Movement 150 (1986).

The St. Croix River is part of the national Wild and Scenic Rivers system because it possesses "outstandingly remarkable" values ("ORVs"). *See* Wild and Scenic Rivers Act § 1, 16 U.S.C. § 1271; *see also* Scenic River Study, *supra*, at 11 (finding the river to have outstandingly remarkable scenic, recreational, and geologic values). *Amici* share an appreciation for the ORVs of the St. Croix River that have been identified by the federal government. For example, the Association's annual photography contest embraces the river's scenic value, and organized canoe trips, the first of which, in 2011, was seventeen days long, illustrate the river's recreational value. *See* Figures 1-3, *infra;* St. Croix River Association Photo Contest, St. Croix River Association, www.stcroixriverassociation.org/scra-photo-contest/ (last visited Apr. 12, 2016); 2016 Paddle Namekagon, Wild and Scenic Paddles, https://scrapaddle.org (last visited Apr. 12, 2016). Likewise, *amici* and the Act work in tandem to protect the St. Croix. Shoreline development is a threat that both *amici* and federal agencies have identified. *See, e.g.*, Most Endangered Rivers: About This Report. American Rivers. www.americanrivers.org/endangered-rivers/about/ (last visited Apr. 7, 2016) (identifying the St. Croix as one of "America's Top Ten Endangered Rivers" in 2009 and 2011, in part because of the threat of increasing development and loosening zoning restrictions); Scenic River Study, *supra*, at 11 (finding the river

endangered by "[a] shoreline which is rapidly being developed for both residential and commercial uses"). Indeed, the affinity between the Act and *amici* date back to 1965 when the Association lobbied for federal protection of the inclusion of the St. Croix River. *See* Part II, *infra;* Dunn, *supra*, at 38-39. In addition, *amicus* former U.S. Senator Mondale co-sponsored bills in 1965 and 1967 to give federal protection to the St. Croix River, and ultimately supported its inclusion in the incipient Wild and Scenic Rivers Act. *See* Theodore J. Karamanski, Saving the St. Croix: An Administrative History of the Saint Croix National Scenic Riverway 73-90 (1993) (describing history of federal protection). The provenance of *amici* legitimates their role as the voice of the river in this case.

## SUMMARY OF ARGUMENT

Petitioners challenge a 1975 zoning ordinance that restricts the development and sale of their substandard shoreline parcels on the St. Croix River. Petitioners erroneously contend that the "parcel as a whole" principle should not apply to their land and seek to have the application of the zoning ordinance held a regulatory taking within the meaning of the Fifth Amendment. *See* U.S. Const. amend. V. *Amici* respectfully submit the following information in support of Respondents, who ask the Court to reject these arguments and to affirm the decision of the Wisconsin Court of Appeals.

*Amici* believe that the factual context of the St. Croix River and the laws that protect it demonstrate the validity of the challenged regulations. Three facts make this clear. First, the federally-recognized

outstandingly remarkable scenic, recreational, and geologic values of the river, along with its numerous fish and wildlife, are indeed remarkable and deserve protection. Second, the federal designation of the St. Croix River as part of the Wild and Scenic River system arises from a longstanding *local* desire to see the river protected. Third, Congress intended the Act to facilitate and coordinate federal, state, and local action to protect Wild and Scenic Rivers, and local ordinances like the one at issue in this case are vital to the effective implementation of the Act.

## ARGUMENT

### I. The St. Croix River is Worthy of National Recognition and Protection Because of its Outstandingly Remarkable Scenic, Recreational, and Geologic Values and its Fish and Wildlife.

The St. Croix River flows 165 miles from its source in northeast Wisconsin to its confluence with the Mississippi River. For most of its length, the river forms the boundary between Wisconsin and Minnesota. The river varies in appearance along its length, "from a deep, narrow gorge with basalt cliffs to expansive views of a wide river valley." Wis. Dep't of Natural Res., Minn. Dep't of Natural Res., U.S. Dep't of Interior, Nat'l Park Serv., Cooperative Management Plan of the Lower St. Croix National Scenic Waterway 3 (2002) [hereinafter Cooperative Management Plan]. In its lower stretch, the river slows down and spreads out, forming Lake St. Croix. This is the location of the Murr's cabin, about twelve

river miles from the Mississippi. Elizabeth Ellet, a nineteenth century American author and historian, described Lake St. Croix in a travelogue of a Mississippi River steamboat tour:

> After leaving the Mississippi, we entered through a narrow channel into Lake St. Croix . . . . Bluffs line the [Minnesota] shore on the left hand; on the other [Wisconsin] is a low wall of rocks, gradually rising and receding a little as you advance, till they too become towering heights. The graceful curve of the line of shore, the alternate swelling and sinking of the wooded hills, the deep ravines occasionally opening between them – the dark shadows thrown by the heights on the water, with the narrow line of light near the shore marking the departure of the sun, and now and then a projecting headland further out, a dark and shaggy mass – were so beautiful, that one could not regret the scenery of the Mississippi.

Elizabeth Fries Ellet, Summer Rambles in the West 137 (1853).

Ms. Ellet's appealing description of the St. Croix River foreshadowed a 1972 Department of the Interior study. That study identified the river's scenic, recreational, and geologic values as the basis for its inclusion in the national Wild and Scenic River

program.[3] Scenic River Study, *supra*, at 11-12. The scenery of the St. Croix River defies easy description. The federal Scenic River Study dryly described the river as having "[a] highly scenic course, complemented by an island and slough river environment in the upper reaches and a lake-like river environment in the lower reaches." Scenic River Study, *supra*, at 15. A better sense of the river's scenery comes from Ellet's lyrical prose:

> No more exquisite landscape could be pictured by fancy . . . . The headlands on either side approach near each other, the morning sunshine is golden on their woods; the calm water lies like a sheet of silver between, and the background is a lofty forest-covered bluff. In the foreground is an island covered with tall trees, the only undergrowth being the tall grass, brilliantly green.

Ellet, *supra*, at 140. The popular appreciation for the scenery of the St. Croix also appears in state and federal legislatures. *See* Wis. Stat. § 30.27(1) (2016) ("The preservation of this unique scenic and recreational asset is in the public interest and will benefit the health and welfare of the citizens of Wisconsin."); *see also* Minn. R. 6105.0351 (2016) (protecting the "outstanding scenic, recreational, geologic, fish and wildlife, historic, cultural, and other

---

[3] The 1972 study examined only the lower fifty-two miles of the river, known as the Lower St. Croix, which contains the Murrs' cabin. The upper portion of the river was designated a Wild and Scenic river in 1968. Wild and Scenic Rivers Act, Pub. L. No. 90-542, § 3(a)(6), 82 Stat. 906, 908 (1968).

similar values of the Lower Saint Croix National Scenic Riverway."); 118 Cong. Rec. 34,391 (1972) (statement of Sen. Mondale) ("The famed Dalles of the St. Croix, spectacular rock formations, and richly varied scenery have justly brought national acclaim to the St. Croix River.").[4]



*Figure 1: Canoe on the St. Croix River. Mike Chun,* Ready to Go (2015).

Scenery often gives rise to recreation; indeed, the St. Croix's "suitab[ility] for many outdoor recreation pursuits" was a reason for its recommended inclusion in the Wild and Scenic Rivers system. Scenic River Study, *supra*, at 15. In the context of the Act, recreational value is defined as including "sightseeing, wildlife observation, camping, photography, hiking, fishing, hunting and boating." Interagency Wild and Scenic Rivers Coordinating Council, U.S. Forest Serv. & Nat'l Park Serv., The Wild & Scenic River Study Process 13 (Dec. 1999)

[4] The Dalles of the St. Croix is located on the Lower St. Croix.

[hereinafter Study Process]. Visitors to the Lower St. Croix River can enjoy all of these activities. However, high quality and widely enjoyed recreation can motivate an increase in private development to capture higher property values, which, in turn, will destroy the values of the river that attract people to it in the first place.

To allow unchecked private development would prioritize the preferences of shoreline property owners, who constitute a *minority* of river users, to the detriment of the majority of people who recreate on the St. Croix River. The definition of "recreational" in the context of the Act emphasizes attracting visitors "willing to travel long distances to use river resources." Study Process, *supra*, at 13 (discussing "opportunities [that] . . . have the potential to attract[] visitors from outside the region"). More than seventy percent of visitors to the St. Croix National Scenic Riverway are non-local.[5] Nat'l Park Serv., Natural Resource Report NPS/NRSS/EQD/NRR—2015/947, 2014 National Park Visitor Spending Effects: Economic Contributions to Local Communities, States, and the Nation 33 (2014), www.nature.nps.gov/socialscience/docs/VSE2014_Final.pdf (finding also that non-local visitors to the St. Croix spent $24 million and supported 397 jobs in 2014). Many of these visitors participate in

---

[5] Non-local visitors are defined as those coming from counties more than 60 miles away from the St. Croix National Scenic Riverway, which includes the entire length of the St. Croix River. Nat'l Park Serv., Natural Resource Report NPS/NRSS/EQD/NRR—2015/947, 2014 National Park Visitor Spending Effects: Economic Contributions to Local Communities, States, and the Nation 3, 14 (2014), www.nature.nps.gov/socialscience/docs/VSE2014_Final.pdf.

recreational activities that require the natural richness of the St. Croix River to remain intact, such as chartered fishing. *See, e.g.*, St. Croix River Fishing Guides, St. Croix River Fishing, www.stcroixriverfishing.com/FishingGuides.html (last visited May 2, 2016) (describing the Lower St. Croix River as being "prime habitat for the largest fish in the river, including sturgeon and flathead catfish").

The threat of development was central to the argument for designating the St. Croix River as part of the Wild and Scenic River system. During debate in Congress, then-Senator and *amicus* Walter Mondale described the river as "probably the last remaining unpolluted, scenic river left in the Nation next to a major metropolitan area" and asked "whether the St. Croix River is going to go the way that all other rivers have gone, from lovely, scenic, magnificent rivers into ugly, desecrated sewage." Designating a Segment of the St. Croix as Part of the Wild and Scenic Rivers System: Hearing on S. 1928 Before the Subcommittee on Public Lands of the Committee on Interior and Insular Affairs, 92d Cong. 4-5 (1971-72) (statement of Sen. Mondale). As this lawsuit demonstrates, development continues to threaten the values of the St. Croix River today.

The development of private shoreline property along the St. Croix River benefits property owners, but can impair the enjoyment of all others. Unrestrained development and its effects generally impair recreation in natural places and would ruin the values that make the St. Croix River a favored location for recreation.[6] *See, e.g.*, Jan G. Laitos &

---

[6] For example, the sewage system on the Murrs' property is a cesspool that discharges raw sewage into the St. Croix River. JA 35.

Rachel B. Gamble, The Problem with Wilderness, 32 Harv. Envtl. L. Rev. 503, 523-24 (2008) ("[S]econd-home communities that place people in close proximity to wilderness areas . . . dilute[] the wilderness experience [and] . . . detract from the remoteness people seek in entering wild lands"); William J. Lockhart, External Threats to Our National Parks: An Argument for Substantive Protection, 16 Stan. Envtl. L.J. 3, 40-41 (1997) ("[A]n increasing multitude of development activities external to our parks are impacting and threatening to engulf them, causing increasingly severe damage within the parks to the values and resources which they were set aside to preserve."); Joseph L. Sax, Buying Scenery: Land Acquisitions for the National Park Service, 1980 Duke L.J. 709, 709 (1980) ("[E]ven the most conventional private land uses are frequently incompatible with the historic, archeological, and ecological preservation mandates under which the park system operates"). Based on the purposes of the Act, and the reality that the vast majority of users of the St. Croix do not own property on it, it is entirely consistent with the recreational value of the river to reasonably limit private development.



*Figure 2: St. Croix Dalles. Gary Noren (2012).*

The values of the St. Croix River also include "[a]n outstanding area of 'geological' interest, notably the Dalles of the St. Croix." Scenic River Study, *supra*, at 15. The geology of the Dalles of the St. Croix River both contributes to the scenic value of the river and to scientific inquiry. The geology often appears in descriptions of the river. *See, e.g.*, 118 Cong. Rec. 34,391 (1972) (statement of Sen. Jackson) ("[T]he famous Dalles of the St. Croix [is] an area of outstanding scenic and geological interest."); Ellet, *supra*, at 143-44 ("The stream enters a wild, narrow gorge, so deep and dark, that the declining sun is quite shut out; perpendicular walls . . . rising from the water, are piled in savage grandeur on either side."). The Dalles of the St. Croix is also an area of scientific interest. Minn. Dep't Natural Res., Geology of Interstate Park: The St. Croix Dalles (2009), http://files.dnr.state.mn.us/destinations/state_parks/interstate/interstate_geology.pdf (The area "contains

more potholes in a smaller area than any other location in the world, and has the world's deepest known potholes as well.").[7] In short, "[a]s a result of land acquisition through the Wild and Scenic River Act and by the Minnesota and Wisconsin state parks, access to the geology of the area is excellent." Mark E. Cavaleri, John H. Mossler, and Gerald F. Webers, *The Geology of the St. Croix Valley in* Field Trip Guidebook for the Upper Mississippi Valley Minnesota, Iowa, and Wisconsin 23, 23 (N.H Balaban, ed. 1987).

The fish and wildlife of the St. Croix River are central to the scenic and recreational values of the river – according to one expert, the river is the least human-impacted natural sanctuary in the Upper Mississippi drainage, home to many uncommon Midwestern species. Mussels of the St. Croix River, U.S. Fish and Wildlife Serv.: Endangered Species, www.fws.gov/midwest/endangered/clams/stcroix.html (last visited Jun. 7, 2016). The ecological richness of the river makes it valuable to researchers. Jane E. Brody, New Research Station Exploring the Ecology of a Pristine River, N.Y. Times, (Aug. 21, 1990). ("'Researchers are starving for an area like this to work in,' Mr. Lawrenz said. 'They are coming here to study even before we've advertised that we are ready for them.'"). The St. Croix River is home to iconic wildlife like bald eagles, wolves, heron, osprey, deer, black bear, beavers, and otters. *Id.*; St. Croix State Park: Park Info, Minn. Dep't of Natural Res., www.dnr.state.mn.us/state_parks/st_croix/narrative.html. The St. Croix is also one of the world's greatest

---

[7] In geology, a pothole is a hole in a rock riverbed caused by unusual glacial erosion. *Id.* ("The deepest one that has been measured accurately, the "Bottomless Pit", is just under sixty feet deep and twelve to fifteen feet wide.").

mussel watersheds, with forty-one native species of mussel, including five listed under the Endangered Species Act. *See* Mussels of the St. Croix River, Prof. Dan Hornbach's Lab, www.macalester.edu/~hornbach/stcroix/musseldata.html (last visited Apr. 4, 2016) (identifying the Higgins eye, sheepnose, snuffbox, spectaclecase and winged mapleleaf mussels as endangered inhabitants of the river).

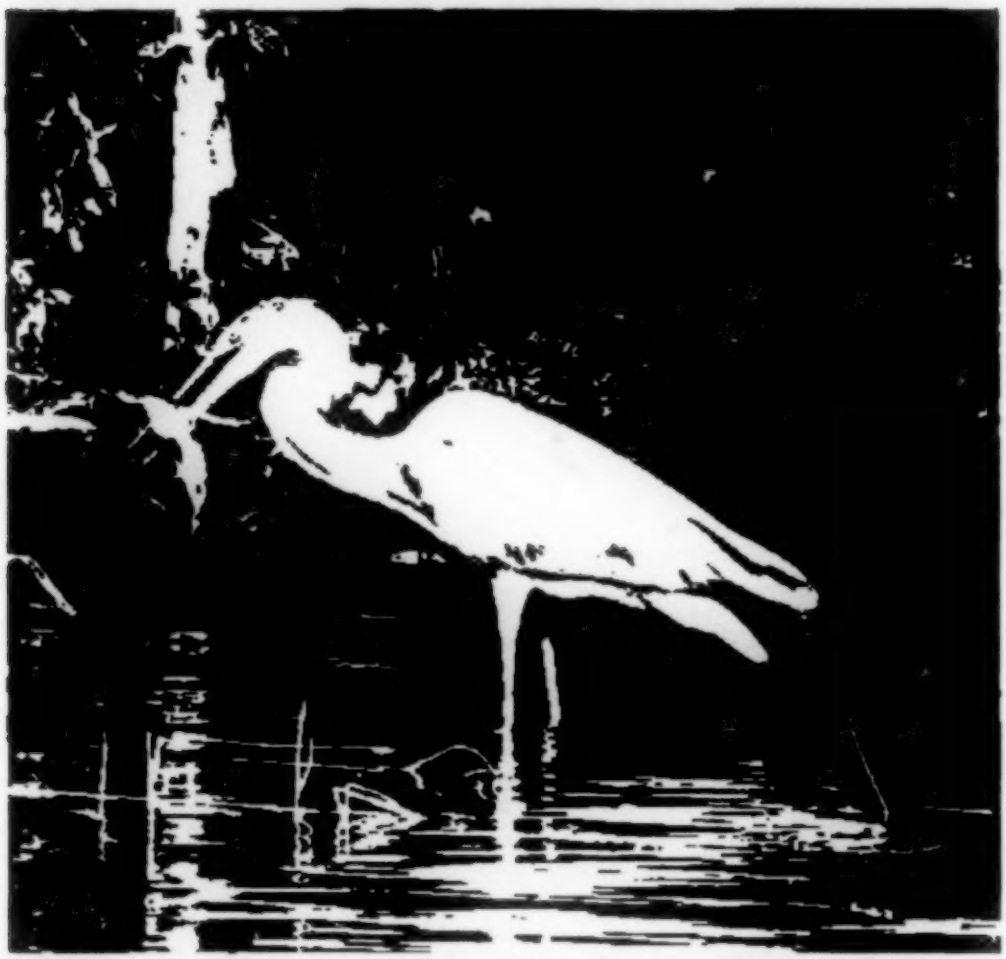


*Figure 3: Heron on the St. Croix River. Deborah Weldele,* Shore Lunch *(2014).*

More visibly, birds and birders are attracted to the St. Croix, which is home to Global and Continental Important Bird Areas recognized by the National Audubon Society. *See* Fig. 3, *supra*; Important Bird

Areas, National Audubon Society, http://netapp.audubon.org/iba/IBA (last visited Apr. 12, 2016) (identifying *inter alia,* the St. Croix Lake, the St. Croix River, and the St. Croix Bluffs Important Bird Areas). The St. Croix River's numerous fish and wildlife buttress the scenic value of the river and recreational activities such as hiking, birdwatching, photography, canoeing, and fishing.

Describing the St. Croix River as possessing discrete scenic, recreational, geologic, and wildlife value glosses over the reality that these characteristics of the river are interconnected. While characteristics such as scenery and geology are mutually supportive, recreation can interfere with other values. The Act and its implementing state regulations limit this interference by restricting high-impact uses to certain stretches of the river. For example, Minnesota and Wisconsin jointly developed a plan for the management of the Lower St. Croix River, which established five different "land management areas" to increase government flexibility in meeting specific land use goals. *See* Cooperative Management Plan, *supra,* at 23-31 (describing land management areas). The use of government regulations to manage land use is well established, especially when preserving commonly held natural resources. *See Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926) ("[W]ith the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands"); *Just v. Marinette Cty.*, 201 N.W.2d 761, 768, 56 Wis. 2d 7, 17 (1972) ("The exercise of the police power in zoning must be reasonable and we

think it is not an unreasonable exercise of that power to prevent harm to public rights by limiting the use of private property to its natural uses.").

## II. Local Concern Led to Federal Protection for the St. Croix River.

A local desire for federal protection of the St. Croix River grew into the inclusion of most of the river in the 1968 Wild and Scenic Rivers Act. In 1964, a local power company announced a plan to construct a large power plant on the St. Croix River, drawing widespread public calls to protect the St. Croix River from development and pollution. Dunn, *supra*, at 36. This local desire to protect the St. Croix[8] manifested itself at the federal level in 1965, when U.S. Senators Walter Mondale of Minnesota and Gaylord Nelson of Wisconsin called for a "bill to provide for the establishment of the Saint Croix National Scenic Riverway." S. 897, 89th Cong. § 1 (1965). The bill languished, and in 1967 Senators Mondale and Nelson agreed to fold protection of the St. Croix River into the Wild and Scenic Rivers Act. Karamanski, *supra*, at 90. As the only eastern river in the Act, the St. Croix River gave the Act national scope. *Id.* at 102. The Act excluded the Lower St. Croix, however, because existing development and privately held shoreline would hinder federal acquisition and management of the riverine property. *Id.* at 90.

Passage of the Wild and Scenic Rivers Act in 1968 did not satisfy the local desire to protect the St. Croix River. Under pressure from members of

---

[8] Wisconsin's interest in protecting its rivers led to enactment the nation's first state Wild and Scenic Rivers Act. Palmer, *supra*, at 150; *see also* Wis. Stat. § 30.26 (2016).

Congress representing the Lower St. Croix area, the Secretary of the Interior proposed splitting the unprotected Lower St. Croix into federal- and state-managed sections. Karamanski, *supra*, at 145-47. With some exceptions, "valley residents from Taylors Falls to Prescott, Wis., gave hearty approval to the plan, because it would limit commercial, industrial and residential development in the lush valley." Bob Goligoski, Lower St. Croix Plan Applauded, St. Paul Pioneer Press, June 9, 1971, at 27, *quoted in* Jay Krienitz & Susan Damon, "The Rivers Belong to the People": The History and Future of the Wild and Scenic River Protection in Minnesota, 36 Wm. Mitchell L. Rev. 1179, 1190 (2010). In 1972, Congress amended the Act to include the Lower St. Croix. *See* Lower Saint Croix River Act of 1972, Pub. L. No. 92-560, § 2, 86 Stat. 1174, 1174 (codified at 16 U.S.C. §§ 1271, 1274). The bill passed "with Minnesota and Wisconsin politicians, both Republicans and Democrats, all in favor of 'saving' the Lower St. Croix." Eileen M. McMahon & Theodore J. Karamanski, North Woods River: The St. Croix River in Upper Midwest History 275 (2009). The upper twenty-seven miles of the Lower St. Croix were immediately included in the Wild and Scenic River system, to be managed by the National Park Service. Lower Saint Croix River Act of 1972 § 2. The amended Act also directed the Department of the Interior to designate the final twenty-five miles only on request of the governors of Minnesota and Wisconsin. *Id.*

Inclusion of that final stretch took four more years. Minnesota and Wisconsin quickly fulfilled their obligations, but the Department of the Interior delayed for years before yielding to congressional pressure. *See* Karamanski, *supra*, at 158-68. The

mayor of a riverside community wrote in support of designation: "Somewhere in this world of short-term decision making, protecting 'hindsides' and other 'people' problems has to come the vision of a tomorrow, a recognition of what our true legacy should be. The St. Croix is our legacy; it is worth saving." Letter from James Johnson, Mayor, Marine-on-St. Croix, Minnesota, to National Park Service, October 16, 1974, *quoted in* Karamanski, *supra*, at 167. On June 17, 1976 – more than a decade after Senators Nelson and Mondale first proposed federal protection for the St. Croix – the final, state-managed stretch of the St. Croix River joined the Wild and Scenic River system. *See* Lower Saint Croix National Scenic Riverway, 41 Fed. Reg. 26,236 (June 25, 1976).

## III. State and Local Ordinances Achieve the Wild and Scenic Rivers Act's Protection of the Lower St. Croix River.

The federal Wild and Scenic Rivers Act requires coordination with local and state legislation to function effectively – a partnership of federal, state, and local governments. For the St. Croix River, the Act facilitates cooperation between states, and between the states and the federal government. This cooperation is most visible in the management of the Lower St. Croix, where a higher portion of land is privately owned. The Act does not allow federal agencies to regulate private land use – that task is left to the states and their political subdivisions. In this instance, the State of Wisconsin enacted its own law, setting standards for the use of land along the Wild and Scenic St. Croix River; counties and towns are

then obligated to regulate land use at the local level in accord with state requirements. Private land use along the river is, thus, not regulated in response to federal mandates, but rather through local land use ordinances. Such ordinances represent the policy preferences of the citizens of Wisconsin and the St. Croix River community. Absent effective local land use regulation to protect them, many of the Wild and Scenic rivers like the St. Croix River would lose the outstandingly remarkable values that justified their federal designation.

The Act requires state concurrence in designating a river as "Wild and Scenic" – designation cannot happen administratively. A river is authorized for inclusion either by Congress, where the states have a voice, or on application by the legislatures of the relevant states. Wild and Scenic Rivers Act § 2. The Lower St. Croix was designated through a hybrid of these two processes, with federal legislation making designation dependent upon the application by Wisconsin and Minnesota. *See* Lower Saint Croix River Act of 1972 § 2. To comply, the two States adopted "a comprehensive master plan for the river area . . . [and] initiat[ed] a management and development program." Lower Saint Croix National Scenic Riverway: Inclusion in Wild and Scenic Rivers System, 41 Fed. Reg. at 26,236-37. In effect, the States adopted and implemented the Act's purpose to "protect and enhance" the Lower St. Croix. *See* Wisc. Stat. § 30.27; Minn. Stat. § 103F.351 (2016). Requiring state buy-in for designation of the St. Croix ensured that the two States possessed the necessary political will to cooperate with the federal government in accomplishing the purposes of the Act.

After a river becomes a designated part of the Wild and Scenic River system, state and federal cooperation continues. The Act authorizes the federal government to acquire fee title to land, but places limits on that authority for land that is owned by states or is part of an incorporated city. Wild and Scenic Rivers Act § 6. The Act also expressly permits federal authorities to "cooperate in the planning and administration" of designated rivers with state and local governments. *Id.* at § 10(e). Furthermore, the Act requires the federal government to "encourage and assist" state planning to consider "needs and opportunities for establishing state and local wild, scenic, and recreational river areas." *Id.* at § 11(a). In all, the design of the Act recognizes that effectively protecting rivers requires cooperation by all levels of government, and the text of the Act provides the mechanisms for that cooperation to occur. The St. Croix River provides an archetypal example of this mutually beneficial, cooperative approach to conservation.

County land use regulations protect the lower, state-managed portion of the Lower St. Croix. The Cooperative Management Plan was adopted by federal and state authorities as the federally-required "general management plan" for the lower riverway. Cooperative Management Plan, *supra*, at *iii*, 1. The Cooperative Management Plan recognizes that "[t]here must be a framework for federal, state, and local cooperative management." *Id.* at 15. It acknowledges that one of the chief issues facing the Lower St. Croix is increased development and changing land use. *Id.* at 17. Accordingly, "to protect the river's outstanding values," the plan recommends states adopt "[s]pecial zoning guidelines." *Id.* at 59.

These include "[m]inimum lot width and lot size standards . . . to ensure that development in certain areas does not change the character of the setting and to prevent additional impacts as seen from the river." *Id.*

The policy recommendations of the Cooperative Management Plan are incorporated into Wisconsin law, which directs the state's Department of Natural Resources to issue zoning rules consistent with "any pertinent guideline . . . promulgated by the secretary of the interior under the wild and scenic rivers act." Wis. Stat. § 30.27(2)(b); *see also* Minn. Stat. § 103F.351(4) (same). "Counties, cities, villages and towns lying, in whole or in part, within the areas affected by" each state's natural resources department regulations must adopt rules at least as stringent as the regulations. Wis. Stat. § 30.27(3); *see also* Minn. Stat. § 103F.351(4)(c) (same). St. Croix County adopted consistent zoning rules in 1976, which are the subject of the Murrs' challenge. *See* St. Croix County, WI, Code of Ordinances § 17.36(I)(4)(a) (2005).

A combination of state and federal action is required for a river to be designated as "Wild and Scenic," to formulate a management plan, and to regulate local land use. Democratic processes influence river management decisions at almost every stage.[9] Thus, the federal protection of the St. Croix River's outstanding scenic, recreational, and geologic values draws political legitimacy from its state and local implementation and the public support of the

---

[9] The 2015 passage of Wisconsin Act 55, which reduces shoreline zoning restrictions, is an example of state democratic processes shaping zoning requirements. *See* 2015-2016 Wisc. Legis. Serv. Act 55 (2015 S.B. 21) 336-38 (West) (amending Wis. Stat. § 59.692).

State of Wisconsin and the greater St. Croix community.

## CONCLUSION

The judgment of the Wisconsin Court of Appeals should be affirmed.

Respectfully submitted,

Hope M. Babcock
*Counsel of Record*
Daniel H. Lutz
INSTITUTE FOR PUBLIC REPRESENTATION
Georgetown University Law Center
600 New Jersey Avenue NW
Washington, DC 20001
(202) 662-9535
babcock@law.georgetown.edu

*Counsel for amici curiae*

# AMICUS CURIAE BRIEF